(5)

No. 88-2018

In The
Supreme Court of the United States
October Term, 1989

STATE OF ILLINOIS,
Petitioner,
--against--
EDWARD RODRIGUEZ,
Respondent.

ON WRIT OF CERTIORARI
TO THE APPELLATE COURT
OF THE STATE OF ILLINOIS

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE LINCOLN LEGAL FOUNDATION, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., THE NATIONAL SHERIFFS' ASSOCIATION, INC., THE CHICAGO CRIME COMMISSION, AND THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, IN SUPPORT OF THE RESPONDENT.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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CHIEFS OF POLICE,
IN SUPPORT OF THE PETITIONER

This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner and the Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* over eighty times in the Supreme Court of the United States, and thirty-eight times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Lincoln Legal Foundation (LLF), is a national, nonprofit, nonpartisan, public-interest law center which undertakes litigation, administrative proceedings, legal studies, and educational activities in matters promoting political, economic, and civil liberties; preserving

constitutional government, including the separation and limitation of governmental powers; and defending the rights of innocent victims of crime.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association Inc. (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Constitution.

The Chicago Crime Commission (CCC), is a not-for-profit Illinois corporation that has provided, since 1919, an independent oversight of the criminal justice system in the Chicago metropolitan area. It is composed of prestigious members of the business, professional and legal community, whose purpose is the improvement of the system and a better understanding of its workings by law-abiding citizens.

The Illinois Association of Chiefs of Police represents law enforcement executives and administrators in the State of Illinois. It actively engages in training programs and publications for Illinois law enforcement officers, as well as *amicus curiae* advocacy in cases critical to law

enforcement interests in the State.

ARGUMENT

A POLICE OFFICER'S GOOD FAITH RELIANCE ON A THIRD PARTY'S APPARENT AUTHORITY TO PERMIT A CONSENSUAL ENTRY CONSTITUTES A VALID EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT.

Amici are professional organizations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of obtaining and executing arrest and search warrants, making warrantless arrests and searches, including plain view seizures, conducting interrogations, and investigating reports of crimes on and off premises; (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters and to prosecute cases involving evidence obtained thereby; and (3) members of the business and professional communities devoted to the goal of effective law enforcement.

Because of the relationship with our members, and the composition of our membership and directors--including active law enforcement administrators and counsel at the state and national level--we possess direct knowledge of the impact of the ruling of the court below, and we wish to transmit that knowledge to this Court.

Amici will not discuss at length the case law analysis of the Petitioner State of Illinois in this case, although we agree with that analysis. Instead, we will concentrate upon policy issues raised by this case and our need as law enforcement administrators and concerned members of Society to ensure that law enforcement officers have

sufficient guidance in the area of Fourth Amendment jurisprudence.

Amici, with our close involvement in the police community, know that police officers enter private homes for a variety of lawful reasons--e.g., to serve a warrant, to answer a call of distress, to take a routine report, or to render another service. Often they are confronted with situations similar to that presented in the instant case of a complainant who asserts authority to consent to enter premises, and the sighting of contraband or evidence in plain view, and must make decisions concerning the legality of the entry and seizure of evidence.

Police officers were told by the Respondent's (hereinafter called "defendant") wife that she had been living in the defendant's apartment, that her clothes and furniture were in the apartment, that the defendant was asleep there, and that she had a key to the apartment and would let the police into the apartment to arrest the defendant for beating her. The defendant's wife opened the apartment door and let the officers in. When they entered, they saw contraband drugs in plain view and seized it.

The court below, in an unpublished opinion, held that the wife's consent to enter was invalid under the third party consent rule of *United States v. Matlock*, 415 U.S. 164 (1974). *Amici* submit that the Illinois court was in error in its interpretation of *Matlock* and the underlying principles involved.

I. UNDER UNITED STATES v. MATLOCK THE CONSENT WAS VALID.

In *Matlock* this Court ruled that a consent to search property granted by one with "common authority over or

other significant relationship to the premises or effects sought to be inspected," 415 U.S. at 171, is a valid exception to the Fourth Amendment warrant requirement. The Court defined "common authority" for purposes of the rule thusly at 415 U.S. at 171, n. 7:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property • • • but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, *so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.* (emphasis added).

Amici submit that the court below misconstrued *Matlock* as requiring actual authority in every case rather than merely apparent authority (the *Matlock* Court found it unnecessary to reach the apparent authority issue when it concluded that the court below had erroneously excluded evidence of actual authority). Although this Court has not ruled directly on the apparent authority issue, many lower courts have adopted and applied the apparent authority doctrine. *E.g., United States v. Sledge*, 650 F.2d 1075 (9th Cir. 1981); *United States v. Isom*, 588 F.2d 858 (2d Cir. 1978); *Nix v. State*, 621 P.2d 1347 (Alaska 1981); *State v. Lucero*, 143 Ariz. 108 (1984); *State v. Girdler*, 138 Ariz. 482 (1983); *Spears v. State*, 270 Ark. 331 (1980); *People v. Berow*, 688 P.2d 1123 (Colo. 1984); *Flanagan v. State*, 440 So. 2d 13 (Fla. App. 1983); *People v. Adams*, 53 N.Y.2d 1 (1981); *State v. No Heart*,

353 N.W.2d 43 (S.D. 1984). The apparent authority doctrine as applicable to a consent search of premises is also recognized in the Model Code of Pre-Arraignment Procedure, Sec. SS240.2 (1975) ("a person who by ownership or otherwise, is apparently entitled to determine the giving or withholding of consent").

The record below amply supports the conclusion that the police were dealing with a person (defendant's wife) who had apparent authority to consent to their entry of defendant's apartment.

Amici submit that using the apparent authority test, which is firmly established in the courts, the police belief that defendant's wife had "common authority" over the premises was well-grounded.

II. THE POLICE CONDUCT IN THIS CASE WAS OBJECTIVELY REASONABLE.

This Court has for many years taken the position that the guiding purpose--indeed the central rationale--for the Fourth Amendment exclusionary rule is the deterrence of police misconduct, and that without deterrence the rule is not applicable. *United States v. Leon,* 468 U.S. 897 (1984); *Stone v. Powell,* 428 U.S. 465 (1976); *United States v. Peltier,* 414 U.S. 338 (1975); *United States v. Calandra,* 414 U.S. 338 (1974); *Michigan v. Tucker,* 417 U.S. 433 (1974). Indeed, the Court reiterated in *Leon,* 468 U.S. at 908, that "'as with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.'"

Amici realize that this Court has yet to squarely hold that the good faith exception to the exclusionary rule adopted in *Leon* is to be applied broadly in warrantless search cases, although the Court indicated favor for such

an extension in *Illinois v. Krull,* 480 U.S. 340 (1987) (warrantless search conducted under a statute later determined to be unconstitutional was upheld).

A clear-cut extension of this nature is appropriate in view of the underlying rationale for the good faith doctrine. Even those who would oppose such an extension on policy grounds recognize that it is entirely appropriate under the *Leon* rationale, including the respected commentator Professor Wayne LaFave:

> [M]uch of the reasoning in *Leon* will offer support for such an extension of that case beyond the with-warrant situation. Particularly noteworthy is the *Leon* majority's broad assertion that whenever the police officer's conduct was objectively reasonable the deterrence function of the exclusionary rule is not served and that "when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system."

2 LaFave, *Search and Seizure,* (2nd Ed., 1987), Sec. 1.3(g), p. 77.

Even before the formulation of the good faith exception in *Leon,* its guiding rationale was urged in the context of consent searches:

> When the police are engaged in the difficult and sometimes dangerous business of solving crime, actions which they take in a good faith attempt to do their job should not be reviewed by courts against a holier-than-

thou standard of exceedingly technical complexity which the police officers cannot realistically be expected to administer. In other words, judicial determinations of the "reasonableness" of third party consent searches cannot properly ignore the circumstances of the search *as they appeared to the police* at the time the decision to search was made. Specifically, if the police obtain consent to search a house from someone who reasonably appears to them to be in control of the premises and in a position to authorize them to enter, it would be of little social utility for a court subsequently to rebuke the officers by excluding the evidence they obtained during the search on the ground that the person whose consent they accepted in good faith was the "general householder" rather than the "exclusive possessor."

> Reinforcing this line of reasoning is the consideration that the fourth amendment exclusionary rule rests upon a "police misconduct" rationale: that is, unlawfully seized evidence is excluded from trials in order to deter the police from engaging in unlawful conduct. If this deterrent effect exists at all, it quite clearly is of no effect when the police, believing that they are acting lawfully, conduct a search which later turns out to be "unlawful" because they failed to observe a subtle distinction drawn by a defense attorney with 20/20 hindsight.

Comment, 53 B.U.L. Rev. 1087, 1110 (1973).

The facts of this case clearly indicate, *amici* submit, that the officers possessed information that would lead a

reasonable police officer to conclude that there was a valid consent to enter the defendant's apartment. Extension of the good faith exception to warrantless searches generally, and this seizure in particular, would advance the rationale for the exclusionary rule delineated in *Leon* and give the police further bright-line guidance similar to that argued for successfully by *amici* in *New York v. Belton*, 453 U.S. 454 (1981), and other cases since then.

III. EXTENSION OF THE GOOD FAITH EXCEPTION TO WARRANTLESS CASES WILL POSE NO BURDEN FOR THE COURTS, AND WILL GIVE BRIGHT LINE GUIDANCE TO THE POLICE.

Extension of the good faith exception to warrantless search and seizure cases would, we submit, be uncomplicated for the courts to apply. For example, the constitutional status of a consent could be objectively established without probing subjective elements of a police officer's belief. The need for assessing the credibility of the officer on subjective issues would thus be unnecessary. Such a rule would not only provide guidance but would also streamline the task of suppression hearing courts and the appellate courts. This, too, was recognized by Professor LaFave as a natural result of any extension of the *Leon* doctrine. He states:

> *Leon* takes the view that the "objectively reasonable belief" requirement is a purely objective one, so that there is no need for a court to engage in the particularly difficult speculation of what was actually going on in the mind of the searching or arresting officer. Rather, the inquiry is limited to what "a reasonably well-trained officer would have

> known," and certainly the same limitation ought to obtain if *Leon* were extended to without warrant cases.

2 LaFave, *Search and Seizure*, (2nd Ed., 1987), Sec. 1.3(g) p. 78.

Indeed, this Court has recently recognized the facility with which the objective reasonableness test can be applied even to difficult Fourth Amendment questions such as the constitutional propriety of the use of force by police officers, and has rejected the examination of the subjective element. *Graham v. Connor*, 109 S. Ct. 1865 (1989) (objective reasonableness test applied to Fourth Amendment seizure of a person subjected to investigative detention; officers' "evil intent" irrelevant).

Law enforcement administrators are charged with the duty of adopting and implementing policies and procedures that protect not only the constitutional rights of citizens during the performance of law enforcement functions, but also give law enforcement officers adequate guidance. To that end, law enforcement agencies should be encouraged to adopt and implement professional standards and policies that incorporate these concerns. *Amici*, as professional organizations, encourage the adoption of such model standards and policies for their respective constituencies. We submit that a clear pronouncement by this Court extending the good faith exclusionary rule exception to warrantless search and seizure cases will greatly encourage the promulgation of law enforcement practices and policies that will not only protect the constitutional rights of our citizens, but will also *give adequate guidance to the police.*

CONCLUSION

AMICI RESPECTFULLY REQUEST THIS COURT TO REVERSE THE DECISION OF THE COURT BELOW ON THE BASIS OF LAW AND EQUITY BY HOLDING THAT THE CONSENT INVOLVED IN THIS CASE WAS VALID UNDER UNITED STATES v. MATLOCK, OR, IN THE ALTERNATIVE, THAT THE OFFICERS' CONDUCT WAS OBJECTIVELY REASONABLE AND SHOULD NOT LEAD TO THE SUPPRESSION OF THE EVIDENCE.

Respectfully submitted,

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AMICUS CURIAE

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BRIEF OF AMICUS CURIAE, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENT

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30 pp

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

INTEREST OF AMICUS CURIAE

Amicus Curiae, The National Association of Criminal Defense Lawyers, is a national bar organization with membership exceeding 23,000 lawyers dedicated exclusively to criminal law matters. Its members practice in virtually every state and federal court in this country. They meticulously study and analyze police procedure on a daily basis. The organization is dedicated to the protection and preservation of the Bill of Rights. It is most concerned with any judicial decision that might further limit the protections of the fourth amendment.

The position taken by the State of Illinois in the instant case threatens to carve away another substantial piece of the fourth amendment and to substantially diminish the privacy and security rights of the people against our government. Until now, this Court has limited the ability of

police to search based on consent to instances where someone with actual authority has voluntarily consented to the search. Similarly, it has limited application of the exclusionary rule's good faith exception to searches based on warrants. A decision adopting the State of Illinois' position would dangerously extend the good-faith exception to warrantless searches. It would dramatically change police investigative procedures and severely undermine the protections of the fourth amendment. For these reasons, Amicus Curiae is committed to doing everything within its power to persuade this Court to reject the arguments of the Petitioner.

SUMMARY OF THE ARGUMENT

It is apodictic that warrantless searches and seizures are per se unreasonable subject only to a few specifically established and well-

delineated exceptions. Search pursuant to consent is one such exception. However, the sine qua non of a valid consent search, whether authorized by a person against whom the government seeks to uncover evidence or a third-party, is the actual, voluntary consent of a person with a reasonable expectation of privacy in the area to be searched.

Searches based upon the consent of persons having only "apparent authority" necessarily lack the authorization of a person whose privacy interest is protected by the fourth amendment. From the perspective of the person whose privacy interest is being invaded, the search has no justification whatsoever. It cuts at the very heart of the fourth amendment.

Adhering to an actual authority requirement would be consistent with this Court's prior decisions. Additionally, adopting an apparent authority doctrine

would have a deleterious effect on police practice and the administration of justice. It would put a premium on police ignorance and would discourage diligent investigation to determine the existence of true authority to consent. It would undermine the fourth amendment's preference for searches pursuant to warrant. It would severely compromise the privacy interests of all persons in their homes.

Nor should this Court except the fruits of a search or seizure pursuant to the consent of a person having only apparent authority from the fourth amendment exclusionary rule based on the good faith exception. The two primary components of the rationale underlying the good faith exception are the fourth amendment's preference for the warrant process and a belief that the societal cost of suppression should only be imposed where the exclusionary rule's deterrence purpose

is served. In cases involving searches based on the consent of persons having only apparent authority, police have necessarily disregarded the fourth amendment's preference for the warrant process. Furthermore, suppression under these circumstances will certainly deter police from conducting illegal searches and seizures that are neither based on a warrant, probable cause and exigency, nor the consent of a person with an actual privacy or security interest in the place, thing, or person to be searched or seized.

ARGUMENT

I.

THE FOURTH AMENDMENT PROHIBITS SEARCHES AND SEIZURES BASED ON THE APPARENT AUTHORITY OF A THIRD-PARTY WHERE ACTUAL AUTHORITY IS LACKING.

The fourth amendment to the United States Constitution protects in clear and

unequivocal language "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .." Contrary to the Petitioner's argument, however, "reasonableness" cannot be determined in a vacuum. It must be interpreted with reference to the fourth amendment's next clause which prohibits the issuance of warrants "but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." See United States v. United States District Court, 407 U.S. 297, 315 (1972). Indeed, the warrant requirement is the "very heart of the Fourth Amendment." Id. at 316.

Consistent with this analysis, one of the most venerable principles of fourth amendment law is that warrantless searches and seizures "are per se unreasonable . . .

subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). These exceptions are "jealously and carefully drawn" and the burden is upon the sovereign to demonstrate the applicability of the exception upon which it relies. Coolidge v. New Hampshire, 403 U.S. 443, 355 (1971) (citations omitted). Thus, the manifest preference of the fourth amendment is for searches pursuant to warrants.

Search pursuant to consent is one exception to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Until now, the sine qua non of a valid consent search, as interpreted by this Court, has been the authorization, in fact, of a person whose targeted privacy interest is protected by the fourth amendment. See Schneckloth at 227, 248. This essential requirement follows readily

from this Court's recognition that the "[f]ourth amendment protects people, not places." Katz, 389 U.S. 347 at 356. If the person whose privacy interest is protected by the fourth amendment voluntarily consents to the sovereign's intrusion thereby waiving the protection of the fourth amendment, no additional authorization is required to justify the search.

Similarly, third-party consent, consent by persons who enjoy joint use of, access to, or control over the area to be searched but against whom the search is not intended to produce evidence, is wholly consistent with the fourth amendment. As with traditional consent searches, authority for these searches is given by persons whose privacy or security interests in the targeted area are protected by the fourth amendment. See United States v. Matlock, 415 U.S. 164, 171 and n.7 (1974);

Stoner v. California, 376 U.S. 483, 488-89 (1964); Chapman v. United States, 365 U.S. 610 (1961). To the extent that the person against whom the evidence is to be used might not have consented to the search, it is reasoned that this person assumed the risk that the consenting third-person might authorize the governmental intrusion. Id.

The notion of a search based on the consent of someone with only "apparent authority" necessarily means that this essential authority of a person whose privacy interest is protected by the fourth amendment, is missing. There has been no determination by a neutral and detached magistrate that probable cause exists to justify invasion of the targeted privacy interest. A person whose privacy interests are at stake has not assented to the search and waived the protection of the fourth amendment. Instead, a person who may have no actual concern for or interest in the

privacy of the person against whom the search is directed has authorized the search. Indeed, the individual purporting to give consent, as the instant case vividly demonstrates, may have interests antagonistic to the person whose privacy rights are being compromised. See United States ex rel. Cabey v. Mazurkiewicz, 431 F.2d 839 (3d Cir. 1970). No matter how real this person's authority to consent may appear, from the perspective of the person whose fourth amendment rights are about to be trampled, no authorization justifying the search has been obtained.

Although this Court specifically reserved the question of apparent authority in United States v. Matlock, 415 U.S. 164, 177 n.14 (1974), several of this Court's prior decisions indicate that such searches would violate the fourth amendment. In Chapman v. United States, 365 U.S. 610 (1961), this Court held that the consent of

a landlord was insufficient to authorize the search of a tenant's rented premises. Although the landlord had not only apparent authority, but may well have had actual authority under state law to enter the premises that was searched, id. at 616, this Court held that "to uphold such an entry, search and seizure 'without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords].'" Id. at 617 (citation omitted).

In Stoner v. California, 376 U.S. 483 (1964), this Court addressed the issue of whether a hotel clerk could consent to the search of a hotel room rented to the defendant. In support of the search, the state argued that the clerk had authority under California law to permit entry of his guests' rooms and that "the search was reasonable because the police, relying upon

the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority to consent to the search." Id. at 488. In response, this Court stated: "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" Id.[1]

For the reasons intimated by the decisions of this Court and others, the Illinois courts, e.g., People v. Vought, 174 Ill. App. 3d 563, 528 N.E.2d 1095, 1099-1100 (1988); People v. Bochniak, 93 Ill. App. 3d 575, 577, 417 N.E. 2d 722, 724 (1981), as well as courts in several other jurisdictions have firmly rejected the

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[1] Were this Court to adopt an apparent authority doctrine, persons whom this Court has previously held could not consent to a search due to lack of actual authority, see Stoner (hotel clerk); Chapman (landlord), would now be entitled to give consent.

apparent authority doctrine. E.g., Farmer v. State, 759 P.2d 1031, 1032 (Okl. Cr. 1988); State v. Carsey, 664 P.2d 1085, 1093-95 (Or. 1983); cf. United States v. Elrod, 441 F.2d 353, 356 (5th Cir. 1971)(rejecting government's argument that officer's reasonable belief in voluntariness of consent by mental incompetent justified search). The court in Vought drew support for its decision from this Court's decisions in United States v. Leon, 468 U.S. 897 (1984) and Payton v. New York, 445 U.S. 573 (1980). The court noted that the rule of Payton was intended to deter police officers from making warrantless entries into homes absent exigent circumstances. Id. 528 N.E. 2d at 1100. It further reasoned that applying the exclusionary rule will deter police officers from choosing to conduct a warrantless search absent exigent circumstances compelling this decision. Id.

In the case of State v. Carsey, 664 Pa.2d 1085 (Or. 1983), the Oregon Supreme Court rejected the notion that consent by a person with apparent authority was sufficient to justify a warrantless search. Explaining its ruling, the court stated:

> It must be kept in mind that the consent exception is just that - an exception - an exception perched upon the existence of commonality of use, control or occupancy of the searched premises. As stated, consent of a person who under Matlock has no status as a common occupant is, in effect, no consent at all. Such an entry, so far as the defendant is concerned, is identical to an entry in which no consent had been obtained. The defendant's expectation of privacy is the same and the interference with the defendant's privacy is identical in both cases.

Id. at 1094. The court characterized the apparent authority doctrine advanced by the state as "[a]n ignorance is bliss exception." Id.

The Petitioner places substantial reliance on the reasoning underlying the

decision in United States v. Rodriguez, 888 F.2d 519 (7th Cir. 1989) which endorsed the apparent authority doctrine. The reasoning of this decision is flawed and flies in the face of decisions of this Court. The court in Rodriguez asserted that "[t]the question posed by the Fourth Amendment is whether the search is 'reasonable', and it is reasonable to act on the basis of apparent valid consent." Id. at 523. The court appears to have forgotten that the Fourth Amendment "was not enacted for the primary purpose of encouraging police to act in good faith. It was enacted to protect people in their homes against unreasonable, warrantless searches." State v. Carsey, 664 P.2d at 1094. The Rodriguez court feared that requiring actual authority "would make the outcome of the search depend on niceties of property or marital law far removed from the concerns of the Fourth Amendment." Id. at 523. This Court

has, however, clearly rejected any notion that actual authority to search depended upon technical distinctions in property and marital law. E.g., United States v. Matlock, 415 U.S. 164, 171 n.7 (1974). Instead, this determination is based on a general body of jurisprudence arising under the fourth amendment focusing generally on whether the individual has a reasonable expectation of privacy in the place to be searched. Cf. Rawlings v. Kentucky, 448 U.S. 98, 104-05 (1980); United States v. Salvucci, 448 U.S. 83, 87 (1980); Rakas v.Illinois, 439 U.S. 128, 143, n.12, 152 (1978). Finally, the Rodriguez court's concern over the delay that would result from investigating the authority of a person who gave consent is overwhelmingly outweighed by the danger that absent such investigation, a home or other privacy interest held sacred by our constitution and society may suffer an unauthorized

intrusion.

The Petitioner's reliance on this Court's decisions in Hill v. California, 401 U.S. 797 (1971) and Maryland v. Garrison, 480 U.S. 79 (1987) is misplaced and fails to justify adoption of an apparent authority doctrine. In Hill, this Court upheld a search incident to an arrest of a man officers reasonably, but erroneously, believed was a different individual for whom they had probable cause to arrest. The decision rested on the rather unexceptional conclusion that probable cause, not certainty, is all the fourth amendment requires. Id., 401 U.S. at 804. In the instant case, the police did not rely upon probable cause to justify their entry into the Respondent's home. There is nothing in the fourth amendment to suggest "probable" consent can justify this intrusion.

In Garrison, this Court upheld the

search of the defendant's apartment that was erroneously included in the description of the place to be searched in a warrant. As this Court's decision in Leon makes clear, the intervention of a detached and neutral magistrate and the searching officers' reasonable reliance on the warrant distinguish Garrison from the instant case.

Any decision fashioning an apparent authority doctrine will have disastrous consequences in police practice and the administration of justice. Once police obtain a colorable consent to search, they will have little incentive to conduct any further investigation to determine whether the person has actual authority. Police will be discouraged from seeking out and confronting persons with actual authority who may withhold consent to search. Police will have little incentive to invoke the warrant procedure. Indeed, where probable

cause is lacking or obtaining a warrant would be inconvenient, police would have substantial incentive to seek out someone lacking in actual authority but whose circumstances might provide them with the appearance of authority.[2] As stated supra, many times, the person with colorable authority will have an interest antagonistic to the person whose privacy interest is being invaded. Permitting consent searches based on apparent authority would encourage police to pray on such a person's antagonism and to take advantage of the person's desire to sabotage the rights of the real person in interest.

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[2] While a person with actual authority and, hence, an expectation of privacy in the place to be searched would have a natural instinct to withhold consent and protect the privacy interest, a person with no actual privacy interest in a particular place will have little, if any, incentive to demand compliance with the fourth amendment's warrant requirement. Thus, such a person would be far more susceptible to having her will overborne by officers intent on conducting a search.

II.

THE "GOOD-FAITH EXCEPTION" TO THE FOURTH AMENDMENT'S EXCLUSIONARY RULE IS WHOLLY INAPPLICABLE TO WARRANTLESS SEARCHES IN WHICH THE POLICE THEMSELVES DETERMINE WHETHER THERE IS LEGAL JUSTIFICATION SUFFICIENT TO UNDERTAKE THE SEARCH.

In the case of United States v. Leon, 468 U.S. 897 (1984) a majority of this Court held that when a detached and neutral magistrate issues a search warrant upon which police reasonably rely in searching for and seizing evidence, the fourth amendment exclusionary rule will not, with some exceptions, bar use of the evidence seized if the warrant is ultimately found to be invalid. The decision was based substantially on the fourth amendment's "strong preference for warrants" and the belief that the exclusionary rule, which exacts a heavy toll on law enforcement, should not be applied where its deterrence purpose is not served. Id. at 913-22.

Extension of the good faith exception to the case of searches based on a police officer's reasonable reliance on a third party's apparent authority to consent must be rejected. In these cases the searching officers have disregarded the fourth amendment's preference for the warrant procedure. The officer has chosen to pursue a path that places the citizenship of this country at great peril of having their privacy and security interests violated based on arbitrary judgments. Such decisions cannot be rewarded.

Additionally, unlike the scenario where the officer relies on the judgment of a magistrate, Leon or the determination of the legislature, Illinois v. Krull, 480 U.S. 340 (1987) in conducting a search that is later determined to be without legal basis, suppressing evidence seized based on an officer's erroneous belief in the authority of the person who consented will

deter that officer and others from deciding to base a search on the consent of persons lacking authority. As experience has proven, suppression is the most efficacious vehicle to bring police practice in line with the requirements of the fourth amendment.

Based on this reasoning, federal appellate courts have held fast in rejecting application of the good-faith exception to non-warrant searches and seizures. E.g., United States v. Curzi, 867 F.2d 36, 44-45 (1st Cir. 1989); United States v. Winsor, 846 F.2d 1569, 1579 (9th Cir. 1988) (en banc); United States v. Warner, 843 F.2d 401, 404 (9th Cir. 1988); United States v. Owens, 782 F.2d 146, 152 (10th Cir. 1986); United States v. Milian-Rodriguez, 759 F.2d 1558, 1563, n.2 (11th Cir.), cert. denied, 474 U.S. 845 (1985); United States v. Morgan, 743 F.2d 1158, 1165 (6th Cir. 1984), cert. denied, 471

U.S. 1061 (1985). Consistent with these cases and the reasoning underlying its own decisions, this Court must reject application of the good-faith exception to the circumstances of the instant case.

The apparent authority doctrine fashioned by the Petitioner is a mirage created by the use of lights and mirrors. It purports to authorize searches for which no authority to search exists. It creates an illusion of reasonableness while permitting, and even encouraging, the very type of police misconduct the fourth amendment was intended to prevent. Consent searches, of any sort, must still remain the exception to the warrant procedure which interposes a neutral and detached magistrate between the officer engaged in the often competitive enterprise of ferreting out crime and the person whose privacy interest the fourth amendment was intended to protect. Adoption of the

apparent authority doctrine proposed by Petitioner or extending the good faith exception to this non-warrant scenario would constitute an all too dangerous step toward elimination of the warrant requirement and a return to the days when the extent of one's rights depended on the whims of those in power.

CONCLUSION

For the reasons stated, the judgment of the Appellate Court of Illinois, First District, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of February, 1990, to: ROBERT J. RUIZ, ESQUIRE, The Solicitor General, State of Illinois; TERRENCE M. MADSEN, ESQUIRE, Assistant Attorney General, 100 West Randolph Street, Suite 1200, Chicago, Illinois 60601; and CECIL A. PARTE, ESQUIRE, State Attorney, County of Cook, 309 Richard J. Daley Center, Chicago, Illinois 60602.

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